In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, Appellant

FRANCIS C. BOWDEN, JOHN E. HOEKZEMA, ED-WARD G. BARBER, L. McGEE, CHRIS POULSEN, FRED MAYER, DR. F. N. (Doc) DORSEY, ROBERT (Bob) BAKER, and ANTON ANDERSON, Appellees

ON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION

REPLY BRIEF FOR APPELLANT

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11708

UNITED STATES OF AMERICA, Appellant vs.

FRANCIS C. BOWDEN, JOHN E. HOEKZEMA, ED-WARD G. BARBER, L. McGEE, CHRIS POULSEN, FRED MAYER, DR. F. N. (Doc) DORSEY, ROBERT (Bob) BAKER, and ANTON ANDERSON, Appellees

REPLY BRIEF FOR APPELLANT

ARGUMENT

Notwithstanding the fact that there is nothing in the entire Transcript of Record, and particularly in the Minute Order Granting Motion to Quash (R. 18), the Order to Quash (R. 19), or the Oral Decision Granting Motion to Quash (R. 17-18), to indicate that the District Court decided or passed upon anything other than the constitutionality of Ordinance No. 51, Appellees boldly assert that the Court also considered the sufficiency of Appellant's complaint (B. 3). This assertion has no foundation in the record in this matter, nor does it appear from the only opinion ever

rendered by the Court (R. 17-18), that the sufficiency of Appellant's complaint was at all considered. This assertion by Appellees, together with other such assertions throughout their brief, is about as consistent with logic and good reasoning as is their statement that "both contentions were addressed to the discretion of the Court" (B. 2). The validity of Ordinance No. 51 was not a matter of judicial discretion. It was the duty of the Court to apply the well-known rules of statutory construction set forth in Appellant's Brief (pp. 38-39) and to construe Ordinance No. 51 in the light of such rules.

Appellant reiterates that the only question before this Court is whether Ordinance No. 51 is inconsistent with the provisions of 48 U.S.C.A. 57. There is no question as to whether the Common Council of the City of Anchorage had the power to pass an ordinance requiring registration of voters. The question here presented is whether an ordinance such as Ordinance No. 51, requiring registration prior to the day of election, is, for that reason, unconstitutional. This statement is not denied, but rather is admitted by Appellees in their Brief at page 8 where it is stated, "Appellant argues (B-12), that, since cities are authorized to make provision for municipal elections, the authority to require registration under Ordinance No. 51 follows as a matter of course. This would be true but for the fact that such Ordinance by itself makes no provision for receiving votes of unregistered voters." (Emphasis supplied). This statement is an admission

that the Common Council had the power to enact an ordinance requiring registration but a denial that it could pass an ordinance requiring registration prior to the day of election.

The position maintained by Appellant and admitted by Appellees is well stated in somewhat different words in McCrary on Elections, Fourth Edition, Section 132, page 100, as follows:

"But it is to be observed that the Constitution of no State defines the character of the registration law which may be enacted, or provides that registration prior to the day of election may or not be required. It is believed that no case goes so far as to deny the power of the Legislature of a State to pass a registration act, when the Constitution is silent upon the subject. This being so, the question we are considering is not affected by the presence or absence of a constitutional provision authorizing the Legislature to pass such an act. The power exists in either case, and in either case the question must be the same, viz.: whether the act when passed merely regulates the exercise of the right to vote, or goes further and impairs it." (Emphasis supplied).

The primary purpose of registration laws is to prevent intimidation, fraud, bribery and other corrupt practices by providing in advance of the election an authentic list of legal voters. To adopt the position asserted by Appellees, that the registration act must contain a provision for receiving votes of unregistered

voters, would be to nullify and destroy the primary purpose of registration laws.

That Ordinance No. 51 establishes a reasonable and valid system of regulation is adequately shown by the cases cited in Appellant's Brief, pages 20 to 37 inclusive, which reflect the overwhelming weight of authority. If any person's right of franchise is restricted in any manner it is not by virtue of the provisions of Ordinance No. 51, but rather is attributable to such person's own indifference or carelessness. In an opinion by the Supreme Court of the State of Utah in the case of **Earl v. Lewis,** 28 Utah 127, 77 Pac. 238, the Court stated:

"While the right of a person having the constitutional qualifications of a voter cannot be impaired, either by the Legislature or the malfeasance or misfeasance of a ministerial officer, the voter himself may waive the exercise of the right, and he does so whenever he stays away from the polls, or fails to offer to vote at the polls, or neglects to properly apply for registration." (Emphasis supplied).

Appellees then attempt to bolster and explain the decision of the District Court not upon the basis of any fact or matter appearing in the record, but by asserting that the Court took judicial notice of certain matters and that the Court exercised its discretion in dismissing the case. Appellees seek to have this Court determine the case on its merits, a thing which they very carefully avoided in the District Court.

Appellees in their brief have confused the term

"judicial notice" with "personal knowledge." They have overlooked the principle that the Judge is not to use from the bench, under the guise of judicial knowledge, that which he may know only as an individual observer outside of Court. In Wigmore on Evidence, Volume IX, Section 2580, pp. 576-577, quoting from the case of **Varcoe v. Lee,** 180 Cal. 338, 181 Pac. 223, pertaining to the doctrine of judicial notice, it is stated:

"The test, therefore, in any particular case where it is sought to avoid or excuse the production of evidence because the fact to be proven is one of general knowledge and notoriety, is: (1) Is the fact one of common, everyday knowledge in that jurisdiction, which every one of average intelligence and knowledge of things about him can be presumed to know? and (2) is it certain and indisputable? If it is, it is a proper case for dispensing with evidence, for its production cannot add or aid. On the other hand, we may well repeat, if there is any reasonable question whatever as to either point, proof should be required. Only so can the danger involved in dispensing with proof be avoided. Even if the matter be one of judicial cognizance, there is still no error or impropriety in requiring evidence."

In Wigmore on Evidence, Volume IX, Section 2568, page 536, it is stated:

"Judicial notice being a dispensation of one party from producing evidence, it would seem that the party must, in point of form, make a request for it. Upon this request, the Court is bound, it is sometime said, to declare the fact noticed, or at least to make that investigation which it deems necessary."

In the case at bar Appellees did not request the Court to take judicial notice of such matters, nor does it appear other than by Appellees' assertions that such matters were of such a nature that they could have been judicially noticed by the Court.

It is inconceivable that Appellees are serious in their contention that the Court actually decided the case on its merits or exercised its discretion without having heard any of the facts of the case. A hearing on the merits has been the one thing which Appellant has sought since the date of the filing of the complaint in this action. There were no facts before the District Court, nor are there facts before this Court, which would enable either Court to exercise its discretion and determine whether or not as a matter of public interest this case should be prosecuted or dismissed.

It is granted that Appellees' statements to the effect that in quo warranto proceedings the Court, in its discretion, may withhold relief or decline to proceed to judgment and that it may exercise its discretion by dismissing the proceeding and rendering judgment in favor of the defendants on the case made by the pleadings if it appears that such judgment of ouster would not be of public interest or serve any good or purpose, is a partial recitation of the matter set forth in 51 Corpus Juris, Section 34, page 332, and is prob-

ably correct as a general statement of the law. However, it is to be noted that it is stated that judgment may be rendered on the "pleadings," using the plural. It does not state that a judgment of dismissal can be entered solely on the basis of the plaintiff's complaint. Nor have Appellees cited any case which stands for such proposition. In the cases cited by Appellees the Court has in some exercised its discretion on the basis of the pleadings, that is, the petition or complaint, the answer, the reply or replication, and in others the Court has exercised such discretion after a full hearing on the merits. However, in no case cited by Appellees or known to Appellant has the Court claimed to have exercised its discretion based solely upon the complaint in the absence of other pleadings or in the absence of a hearing on the facts of the case.

Appellees then ask the Court to sustain the judgment of the District Court because there is no allegation of fraud, corrupt practices, or that the result of the election would be changed and state that the election ought, therefore, to be allowed to stand in the public interest.

This being an action in the nature of a proceeding in quo warranto, Appellant concedes that under the laws of Alaska the Court would have no authority to declare the election held on April 1, 1947, void. The action is a demand upon the Appellees to show by what right they exercise the functions of the offices into which they have intruded. Therefore, the question to ultimately be determined by the District Court

is not whether the election of April 1st is or is not void, but whether the Appellees have legal title to such offices. In determining the title to such offices the Court is not bound by the certificates of election which were issued but may look beyond such certificates. (People v. Pease, 84 Am. Dec. 242, and People ex rel Judson v. Thacher, 14 Am. Rep. 312). The fact that the Court was requested to declare the election to be void in the prayer of the complaint filed herein is immaterial and may be disregarded. (Ferris, Extraordinary Legal Remedies, Section 129, page 150; State ex rel Major v. Mo. Pac. Railway Co., 240 Mo. 35, 145 S.W. 1088.)

In a quo warranto proceeding brought by the state on the relation of the prosecuting attorney merely to oust the possessor of an office, respondent's right to hold the office depends upon the strength or validity of his own title, and not upon any infirmity in the title of another person. The state is bound to make no showing and defendant must make out an undoubted case. He must set out his title specifically and show on the face of the answer that he has valid title. The people are not called upon to show anything. The entire burden is on the defendant.

51 Corpus Juris, Sec. 75, p. 355, and cases cited in note 65

State v. Kupferle, 100 Am. Dec. 265
People ex rel Judson v. Thacher, 14 Am.
Rep. 312

Ordinance No. 51 states in part, "no persons shall

be entitled to vote at any municipal election who is not registered according to the provisions of this Ordinance." (R. 8).

In 101 A. L. R. page 658, we find the following statement under the heading "Mandatory provisions generally":

"Under statutory, as well as constitutional, provisions requiring qualified voters to be registered before being permitted to vote, which have generally been regarded as mandatory provisions,—the essential substance of the provisions of the various statutes being indicated or suggested in connection with the individual cases,—the courts have as a rule held that votes which election officials have permitted to be cast without compliance with the requirement of registration are illegal and not to be counted; this being, of course, particularly so where the provisions expressly prohibit the counting of such votes or declare that those who are not registered shall not vote." (Emphasis supplied.)

The following cases were cited:

Falltrick v. Sullivan (1898) 119 Cal. 613, 51 P. 947

Briscoe v. Between Consol. School Dist. (1931) 171 Ga. 820, 156 S.E. 654

Jaycox v. Varnum (1924) 39 Idaho, 78, 226 P. 285

Atty. Gen. ex rel. Miller v. Miller (1934) 226 Mich. 127, 253 N.W. 241,A.L.R....

Zeiler v. Chapman (1874) 54 Mo. 502

People ex rel. Frost v. Wilson (1825) 62 N. Y. 186 **Esker v. McCoy** (1878) 5 Ohio Dec. Reprint, 573, 6 Am. L. Rec. 694

King v. State (1924) 96 Okla. 297, 222 P. 960 Wright v. State Canvassers (1907) 76 S.C. 574, 56 S.E. 536

State ex rel. Hyland v. Peter, (1899) 21 Wash. 243, 57 P. 814

In cases involving election contests, as distinguished from actions in the nature of quo warranto, it is generally stated that while it is well settled that where enough illegal votes are cast at an election to change the result or leave it in doubt the election is void. Yet, it is equally well settled that the result of an election will not be disturbed because of illegal votes received unless the aggregate of such votes would change the results. Vol. 29, C.J.S., Elections, Section 219, page 322.

In the present case the number of illegal votes was 653. On pages 6 and 7 of Appellant's Brief the tabulated results of the election are shown. Candidates McGee, Poulsen and Mayer were declared to be elected by votes less in number than the number of illegal votes cast. As between candidate McGee and candidate William H. (Bill) Olson a difference of two votes would have entirely changed the result of the election.

In McCrary on Elections, 4th Edition, Section 396, page 295, it is stated:

"In **Ex parte Murphy**, 7 Cowen 153, it was held that the mere circumstance that improper votes were received at an election will not

vitiate it. In that case, one candidate had received a majority of two votes, and it was charged that two illegal votes were cast, but there was no allegation that they were cast for the candidate having the majority. tion for guo warranto was denied, the Court saying, 'For all that appears the spurious ballots were for the ticket which was in the minority.' This ruling, however, should be explained and probably qualified. If it goes no further than to hold that the information in that particular case was insufficient to warrant the allowance of a quo warranto, it may be accepted as correct, but, if it is construed as asserting the doctrine, that in all cases it is necessary to show that the person declared elected was, in fact, defeated, before the election can be set aside, then it goes too far. An election may be set aside, declared void, and a new election be ordered, upon the introduction of such proof as renders it impossible to determine who has been chosen by a fair majority, but the contestant can, in no case, be declared entitled to the office until he shows, affirmatively, that he has received a majority of the legal votes cast."

Should the District Court subsequently, upon considering the sufficiency of the pleadings to be filed by Appellant, determine that the allegation of the reception of 653 illegal votes is not sufficient to constitute a cause of action in quo warranto, Appellantt stands ready to allege by way of reply, and to prove, that a sufficient number of the 653 illegal votes were fraudulently cast by persons not qualified to vote to have

changed the result of the election.

CONCLUSION

The issue before this Court and the only issue determined by the District Court is the constitutionality of Ordinance No. 51. The District Court did not pass upon the sufficiency of Appellant's complaint nor upon the validity of the April 1st election. This Court is not now in a position to render a decision upon the merits solely upon the basis of the Transcript of Record. Appellant is entitled to its day in Court and a hearing on the merits. The validity of Ordinance No. 51 should be upheld, the judgment of the District Court should be reversed and the cause remanded in order that a hearing on the merits may be had at the earliest possible date.

Respectfully submitted.

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